No. 05-5966

IN THE

Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF OF THE STATES OF MASSACHUSETTS, ALABAMA, ARKANSAS, COLORADO, DELAWARE, HAWAII, INDIANA, MICHIGAN, MONTANA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA AND TEXAS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the states to provide a complete criminal insanity defense to persons other than those who "did not know the criminal act was wrong."

2. Does the Due Process Clause of the Fourteenth Amendment require states to permit evidence of a mental disorder short of insanity under state law to negate *mens rea*?

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INTEREST OF THE AMICI

Amici states have a paramount interest in ensuring that they maintain their traditional prerogative to define the substantive content of their criminal law. Deciding who should be excused from condemnation for their criminal acts due to mental illness has long been one of the most difficult and controversial questions of the criminal law, and our federal system entrusts those decisions to the states. A ruling invalidating Arizona's insanity defense statute on the basis urged by Petitioner here, however, would call into serious question the validity of the majority of state statutes defining substantive criminal insanity defenses. In addition to preserving their sovereignty over their own criminal law, the states have substantial interests in assuring that those guilty of crimes are justly punished, that those who suffer from mental illness that renders them dangerous to others are prevented from causing harm while they receive treatment and care, and that citizens continue to respect the criminal justice system and view its outcomes as just.

STATEMENT

It is undisputed both that Petitioner shot and killed Flagstaff, Arizona, Police Officer Jeffrey Moritz during a traffic stop, and that at the time he killed Officer Moritz, Petitioner suffered from a mental disease—paranoid schizophrenia. At his bench trial, Petitioner raised the affirmative insanity defense provided by Arizona law: "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." Ariz. Rev. Stat. § 13-502(A). The trial court, after hearing extensive expert psychiatric testimony from both parties, agreed that Petitioner suffered from a mental disease, but concluded that he had not proved by clear and convincing

evidence that the disease caused him not to know that shooting Officer Moritz was wrong. Petitioner does not challenge that determination in this Court.

Rather, this petition relates to two separate arguments regarding the scope of Arizona's insanity defense that Petitioner pressed unsuccessfully in the state courts. First, Petitioner argued that § 13-502 is unconstitutionally narrow in scope because it does not provide a defense to a defendant who did not know the "nature and quality" of his act. The Arizona Court of Appeals rejected this argument, holding that the substantive definition of the insanity defense was not governed by the federal Due Process Clause, and alternatively that the "nature and quality" test was simply redundant to the statutory defense: "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" Pet. App. at A16.

Petitioner also argued that the trial court unconstitutionally failed to consider his mental disease evidence in determining whether he had the requisite state of mind to commit first degree murder. The court of appeals, noting that the trial court had not prevented Petitioner from introducing any mental illness evidence and that Petitioner had introduced no evidence to negate *mens rea*, other than the evidence that he introduced to prove insanity, rejected the argument. The court concluded that to rule for Petitioner in these circumstances it would have to ignore the Arizona Supreme Court's holding that "Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the *mens rea* element of a crime." *State v. Mott*, 931 P. 2d 1046, 1051 (Ariz. 1997). Since it was bound by *Mott*, the court of appeals affirmed the conviction.

SUMMARY OF ARGUMENT

1. Petitioner asks this Court to declare Arizona's insanity defense statute unconstitutional because it fails to explicitly state that those who do not know the "nature and quality" of their acts are insane. This position is only supportable if the Fourteenth Amendment imposes on the states the precise formulation of the insanity defense announced to the House of Lords in 1843 after the controversial acquittal of Daniel M'Naghten. But this particular expression of the insanity rule is not so deeply rooted in Anglo-American law that it is a fundamental principle incorporated in the Due Process Clause. To the contrary, the *M'Naghten* formulation was controversial from the beginning and has been repeatedly criticized and revised. Only a few states have preserved the *M'Naghten* defense in exactly its original form, and of the modifications, eliminating the "nature and quality of the act" language has been widely embraced.

If this Court invalidates Arizona's insanity defense statute for failing to expressly require consideration of whether a defendant knew the "nature and quality" of his criminal act, it will call into serious question the validity of the majority of state insanity statutes, which contain no such language. Currently, only 20 states explicitly mention the nature and quality concept as a portion of their insanity defense, and even these states treat that aspect of the test as subsumed within the general test of being unable to distinguish right from wrong. Moreover, contrary to Petitioner's suggestion, the states have substantively narrowed the *M'Naghten* defense in other ways, by, for instance, limiting the kinds of mental disease that may give rise to an insanity defense. At bottom, if there is any rule that may be said to be common to a large majority of the states it is precisely the Arizona rule—that legal insanity means an inability to tell right from wrong.

2. Petitioner argues, in the alternative, that even if states are constitutionally permitted to limit their insanity defense to those who did not know that their criminal act was wrong, due process requires states to provide an additional defense to those with a mental illness not rising to the level of insanity, on the theory that such disorder deprived the defendant of the capacity to form the requisite *mens rea*. Like his other argument, Petitioner's constitutional diminished capacity defense would effectively impose a substantive insanity defense on the states. But the features of a diminished capacity defense suggest that as a constitutional doctrine it would do far more to impair the states' ability to define their own substantive mental illness defenses than if this Court simply wrote *M'Naghten* into the Due Process Clause.

Petitioner's rule would overturn what the Arizona courts regarded as a legislative decision defining the substantive content of the state's criminal law. That the legislature would reject the idea that each offense should be defined to require affirmative proof that the defendant was actually capable of forming the mental states of an undiseased mind is reasonable, especially where the legislature provided a unified defense of mental disease or defect that applies equally to all crimes. This structure is consistent with the legal traditions of the nation, which rest on the common law view that proof of sanity was not an element of a crime, and required affirmative proof of insanity to excuse criminal conduct.

Adopting as a constitutional mandate the diminished capacity defense would require answers to questions that states have generally answered through their substantive insanity laws, such what is a mental illness, and when exactly can a mental illness be said to negate criminal culpability. The diminished capacity defense, which envisions a different mental illness defense for each offense, has in practice been unsuccessful in providing clear answers to these questions. If states are not free to impose clear limits, a constitutional

diminished capacity defense will either license criminal defendants to present evidence of novel and dubious theories of mental illness, or require this Court to decide as a matter of federal constitutional law what a mental illness is and how it operates to negate *mens rea*.

While a diminished capacity defense requires the constitution to answer the same difficult substantive questions of criminal law that a constitutional substantive insanity defense would, it has a crucial practical difference. Treating the question as one of negating *mens rea* effectively puts the burden on the states to prove sanity, and permits defendants to proceed under any one of several substantive insanity tests that have been rejected by the states. Under these circumstances, the state substantive insanity defenses will become superfluous. Moreover, accepting Petitioner's position that certain kinds of evidence must always negate *mens rea* implies that the Due Process Clause defines the contours of the other criminal law defenses that arguably negate the guilty mind, including duress, self-defense, mistake, and intoxication.

This Court should reject Petitioner's invitation to dictate a substantive mental illness defense to the states, and it should reject his alternative suggestion to create a constitutional diminished capacity defense, which would be equally destructive of the states' ability to define their own substantive mental illness defenses. For these reasons, amici states ask that the judgment of the court of appeals be affirmed.

ARGUMENT

I. The Precise Formulation of the Insanity Defense Announced to the House of Lords in Response to *M'Naghten's Case* is not a Fundamental Principle of American Law.

This Court has repeatedly affirmed the primacy of the states in enforcing their own criminal law: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (internal citation omitted). This deference to the states is particularly compelling in regulating the substantive content of the criminal law: "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v Texas*, 392 U.S. 514, 536 (1968) (Marshall, J., plurality opinion).

Even as zealous an advocate of applying the procedural guarantees of the Bill of Rights to the states as Justice Black recognized that constitutionalizing the substantive criminal law strikes at the very heart of our federal system: "It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs." *Id.* at 547 (Black, J., concurring). Creating constitutional rules of substantive criminal law "departs from the ancient faith based on the premise that experience in making local laws by local people themselves is

by far the safest guide for a nation like ours to follow." *Id.* (Black, J., concurring).

If there is any area of the substantive criminal law where respecting the diversity of practice among the states is especially justified, it is in defining the contours of the insanity defense: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536 (Marshall, J., plurality opinion). In this area, perhaps as in no other, experimentation and revision in the states has been the rule. It is as true today as it was in 1968 that "formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Id.* at 536-37 (Marshall, J., plurality opinion).

A. The *M'Naghten* Formulation was Never Recognized by the States as the Exclusive Test for Insanity.

It would be strange indeed if this Court's first departure from its well-founded reluctance to dictate substantive constitutional criminal law was to write indelibly into the criminal law of the states an advisory opinion rendered to the House of Lords more than 60 years after independence. Petitioner's complaint is not that Ariz. Rev. Stat. § 13-502 fails to contain an insanity defense based upon the general idea of the *M'Naghten* test—a concept that authoritative commentators, not least this Court, have described as the "right-wrong test." Such a claim would obviously fail, since § 13-502 focuses exclusively on knowledge of wrongfulness. Instead, Petitioner's claim is necessarily that Arizona (and by extension the other states) are compelled by the Due Process Clause to formulate their insanity defenses in very nearly identical terms to those used by Lord Chief Justice Tindal in *M'Naghten*: "to establish a defence on the ground of insanity, it must be clearly

proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know he was doing what was wrong." 8 Eng. Rep. 718, 722 (1843).

Far from being an ancient precept of the common law, the *M'Naghten* formulation is itself evidence that no consensus existed, even in the mid-nineteenth century, about the essential features of the insanity defense. The reason the Lords required the *M'Naghten* opinion was the perception that the law of insanity was confused, and they sought to impose "more uniformity in language" on judges charging juries in insanity cases, so that "[t]hey would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves . . . ; but they would use one constant phrase, which the public and all persons concerned would be able to understand." Faye Boland, *Anglo-American Defense Reform* 1 (1999) (quoting Lord Brougham). That the judges should be called upon to exercise what was essentially a legislative function, rather than a judicial one, was itself controversial. Justice Maule protested that because the Lords' questions were entirely hypothetical, they were beyond the competence of the judges who decided actual cases arising out of particular facts, and he suggested that "the answers given to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials." 8 Eng. Rep. at 720.[1]

M'Naghten's reception on this side of the Atlantic belies any suggestion that American jurists saw it as the sole

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[1]Indeed, the Judges were exceptionally careful to preface the *M'Naghten* opinion with a warning against placing too much reliance on it as a comprehensive exposition of the law of the insanity defense, emphasizing that it was "impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by [the Judges] to your Lordships' questions." *Id* at 722.

authoritative formulation of the insanity defense. In the first major American case to cite *M'Naghten*, Chief Justice Shaw ignored what was later said to be the central teaching of *M'Naghten* that insanity could only be an excuse if it prevented a defendant from distinguishing right and wrong, and instead instructed that jury to acquit the defendant if it found that he committed homicide while acting "from an irresistible and uncontrollable impulse." *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). The leading case formulating this irresistible impulse test makes explicit that it rests on a rejection of the centrality of *M'Naghten*, which it describes as standing for the principles "[t]hat there is but a single test of the existence of that degree of insanity such as confers irresponsibility for crime," and "that there does not exist in any case of such insanity in which that single test—the capacity to distinguish right from wrong— does not appear . . . ." *Parsons v. State*, 2 So. 854, 859 (Ala. 1887). This rejection of *M'Naghten* was premised on the view that it was, even then, based upon antiquated science, and that courts should not blindly cling to stale legal abstractions in the face of rapidly evolving understandings of human psychology. *Id.* at 858.

The Supreme Court of New Hampshire took this skepticism that any legal formula could adequately capture the essence of insanity even further and essentially left the question entirely up to the jury, asking them merely whether the crime "was the product of a mental disease." *State v. Jones*, 50 N.H. 369, 398-99 (1871) (citing *State v. Pike*, 49 N.H. 399 (1869)).[2] In that court's view, if "clear, categorical, and consistent answers were possible" to the question of what the law of insanity was, then the *M'Naghten* judges would certainly have

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[2]This is also known as the *Durham* test, after *Durham v United States*, 214 F 2d 862 (D C Cir 1954), which adopted the test 80 years later After an extended, controversial period of attempting to refine the *Durham* test, the court abandoned the product rule in favor of the ALI test. *United States v Brawner*, 471 F 2d 969, 975-79 (D C Cir 1972) (en banc).

discovered them. *Id.* at 385. Because the judges "failed utterly to do any such thing," the court concluded that it was effectively impossible to announce a practical, universal legal test of insanity. *Id.* at 385, 393-94.

Even in the majority of states that eventually adopted the form of the *M'Naghten* rule, there was very little agreement about what the test actually meant. By the first part of the twentieth century, the leading commentator on the insanity defense stated categorically that "conflict of opinion exists . . . regarding almost every word of the famous Opinion of the Judges and its numerous and motley progeny." S. Sheldon Glueck, *Mental Disorder and the Criminal Law* 226 (1925).

By mid-century, continuing dissatisfaction with the *M'Naghten* and irresistible impulse tests led to a reform movement that culminated in the 1962 adoption by the American Law Institute of a defense that included both a cognitive test like *M'Naghten* and a volitional component like the irresistible impulse test, but changed their wording to focus on whether defendant had the "substantial capacity" to tell right from wrong or to control himself.[3] Under the ALI test, "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01(1). This formulation was adopted by a substantial minority of the states. It was also influential in causing states to codify their mental illness defenses, and a large majority of the states eventually defined these defenses by statute, rather than caselaw. *See* Model Penal Code § 4.01, cmt. 5 (1980). Most recently, several states have repealed their complete mental illness

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[3]*See* Model Penal Code § 4.01, cmt. 2 (1980) (detailing the perceived inadequacies of the *M'Naghten* and irresistible impulse formulations of the insanity defense)

defense by statute, and instead provide that mental illness evidence be used to negate the mental state element of the crime.[4]

In summary, the history of the development of the criminal law of insanity in the states has in many ways been a history of responding to perceived inadequacies in the *M'Naghten* test and, more generally, to the problem of finding a categorical legal test that can distinguish the blameless and the culpable amidst rapid changes in both scientific knowledge of mental illness and the social and moral judgments associated with it. If it had been the Justices of this Court, rather than the Justices of England, that announced in 1843 that *M'Naghten* was the single, binding formulation of the insanity defense, none of this fruitful debate and development in the law would have occurred. There is no indication that either progress in the science of psychology or evolution in society's attitudes towards responsibility and mental illness have developed to the point that this is the moment to freeze insanity law into a rigid, constitutional mold, much less one that was formed a century and a half ago.

B. Only a Small Minority of States Still Use the *M'Naghten* Formulation Announced to the House of Lords.

As this history of constant criticism and change suggests, there is a broad diversity in the substantive approaches to the insanity defense employed by the states. The vast majority of states no longer even pay lip service to the formulation announced in *M'Naghten*. Currently, fewer than ten states purport to preserve *M'Naghten* in substantially the

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[4] *See* Idaho Code § 18-207, Kan Stat. Ann § 22-3219, Mont. Code Ann. § 46-14-102, Utah Code Ann § 76-2-305.

same form it was announced in 1843,[5] and even some of these remaining pure *M'Naghten* states, in actual practice, depart from the orthodox formulation in structure or language. Thus, while Pennsylvania does retain *M'Naghten* as its sole test of "legal insanity," a defendant may also be found "guilty but mentally ill," if he meets the ALI insanity test. 18 Pa. Cons. Stat. Ann. § 314. Nor do pure *M'Naghten* states seem to insist that the particular formulation announced in *M'Naghten* be preserved. Thus, Nevada, which has adopted *M'Naghten* as a constitutional minimum standard, construes the first element of its test to turn on whether defendant can understand the "nature and capacity" as opposed to the "nature and quality" of his act. *Finger*, 27 P.3d at 85. Similarly, Nebraska explicitly follows the *M'Naghten* rule, but expresses the question as whether the defendant understood the nature, not the "nature and quality" of his act. *Smith*, 592 N.W.2d 143, 147 (Neb. 1999). In Mississippi, which also expressly follows *M'Naghten*, "the test for insanity is whether the defendant was unable to distinguish right from wrong at the time the act was committed." *Russell*, 729 So. 2d at 784.

Perhaps what is most striking is the nearly universal reluctance of state legislatures to enact *M'Naghten* unchanged. Of the more than forty states that have statutorily codified their mental illness defenses, it appears that in only three—Iowa, New Jersey and Washington—have lawmakers accepted *M'Naghten* as the proper test for insanity.

Other than the remaining *M'Naghten* states, the only group of states of any size that share substantively identical insanity defenses are the 13 states that have adopted the ALI

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[5] *See* Iowa Code Ann § 701 4, *Russell v State*, 729 So 2d 781, 784 (Miss 1997), *State v Bonney*, 405 S E 2d 145, 155 (N C 1991), *State v Smith*, 592 N W 2d 143, 147 (Neb 1999); N J. Stat Ann § 2c.4-1; *Finger v State*, 27 P.3d 66, 84-85 (Nev 2001), 18 Pa Cons Stat Ann § 314(c), (d), Wash Rev. Code Ann § 9A 12 010(1)

test by statute,[6] or by caselaw.[7] In a somewhat looser group are the roughly 14 states that provide a statutory cognitive impairment defense broadly focused on the ability to distinguish right and wrong, but without the volitional test or the substantial capacity language that are characteristic of the ALI test.[8] The specific content of these "modified *M'Naghten*" tests is highly variable, and indeed no two of them are exactly alike. They range from Texas's laconic defense for the defendant who "did not know his conduct was wrong," Tex. Penal Code Ann. § 8.01(a), to the much more detailed South Carolina standard which provides a defense where the defendant "lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(a).

The remaining states employ tests that are essentially *sui generis*. Several states have adopted unclassifiable mixtures of the *M'Naghten* and ALI tests. *See, e.g.*, Mo. Rev. Stat. Ann. § 562.086 (defense if defendant was "incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct"); N.Y. Penal Law § 40.15 ("lacked substantial

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[6]*See* Ark. Code Ann. § 5-2-312, Conn. Gen. Stat. Ann. § 53a-13, Haw. Rev. Stat. Ann. § 704-400, Ky. Rev. Stat. Ann. § 504.020(1), Md. Code Ann., Crim. Proc. § 3-109(a), Mich. Comp. Laws Ann. § 768.21a(1), Or. Rev. Stat. § 161.295(1), Vt. Stat. Ann. tit. 13, § 4801(a)(1), Wis. Stat. Ann. § 971.15(1), Wyo. Stat. Ann. § 7-11-305(b).

[7]*Commonwealth v. McHoul*, 226 N.E.2d 556, 563 (Mass. 1967), *State v. Barrett*, 768 A.2d 929, 935 (R.I. 2001), *State v. Lockhart*, 542 S.E.2d 443, 451 (W.Va. 2000).

[8]*See* Ala. Code § 13A-3-1(a), Ariz. Rev. Stat. § 13-502, Cal. Penal Code § 25, Colo. Rev. Stat. Ann. § 16-8-101.5, Fla. Stat. Ann. § 775.027(1), Ind. Code Ann. § 35-41-3-6(a), La. Rev. Stat. Ann. § 14:14, Minn. Stat. Ann. § 611.026, Ohio Rev. Code Ann. § 2901.01(A)(14), Okla. Stat. Ann. tit. 21, § 152.4, S.C. Code Ann. § 17-24-10(a), S.D. Codified Laws § 22-1-2(20), Tenn. Code Ann. § 39-11-501(a), Tex. Penal Code Ann. § 8.01(a).

capacity to know or appreciate either . . . [t]he nature and consequences of such conduct ; or . . . [t]hat such conduct was wrong."). While three states maintain what is effectively the traditional irresistible impulse test, each defines the volitional component of the test differently.[9] Several other states provide different levels of affirmative mental illness defense depending on the specific type of insanity. *See, e.g.*, Del. Code Ann. tit. 11, § 401 (not guilty by reason of insanity if lacked substantial capacity to appreciate wrongfulness, but guilty but mentally ill if suffered from psychiatric disorder that interfered with willpower). Other states with unique mental illness defenses include New Hampshire, which continues to employ the product test, *see* N.H. Rev. Stat. Ann. § 628:2, and North Dakota, which provides a defense where the defendant "lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality," but only applies the defense where willfulness is an essential element of the charged crime. N.D. Cent. Code § 12.1-04.1-01.

Nor is it the case, as Petitioner suggests, that states have generally only departed from *M'Naghten* to broaden its scope. To the contrary, a majority of the states have provided an insanity defense narrower than *M'Naghten* would provide, at least on its face, by defining a class of mental illnesses for which no defense is available. This practice is traceable to the Model Penal Code, which provides that "the terms 'mental

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[9] *See* Ga Code Ann § 16-3-2, 16-3-3 (not guilty if delusion "overmastered will to resist committing crime"), *State v Hartley*, 565 P 2d 658, 660 (N.M 1977) (defense "if . defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act"), *Vann v Commonwealth*, 544 S E 2d 879, 883 (Va Ct App 2001) (irresistible impulse defense "when the accused's mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act")

disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." M.P.C. § 4.01(2). Although this caveat was frequently criticized as intruding on what should properly be a psychiatric question, *see* Wayne R. LaFave, *Substantive Criminal Law* § 7.5(b)(2) (2d ed., 2003), 11 of the 13 ALI states have adopted that portion of the Model Penal Code, and the limitation on defenses for mental illnesses evidenced by antisocial behavior has spread widely to states with modified *M'Naghten* insanity tests and other cognitive tests, and even to Utah and Montana, which have eliminated the affirmative mental illness defense. Utah Code Ann. § 76-2-305(4)(b); Mont. Code Ann. § 46-14-101(2)(b)(i). In addition to the antisocial behavior mental illness exclusion, a number of other states have permitted defenses only for severe mental illnesses, Ala. Code § 13A-3-1(b); Ind. Code Ann. § 35-41-3-6(b); Ohio Rev. Code Ann. § 2901.01(A)(14); Tenn. Code Ann. § 39-11-501(a). Several others have excluded specific conditions from eligibility for a mental illness defense, including personality disorder, Or. Rev. Stat. § 161.295(2), adjustment disorder, seizure disorder, and substance abuse, Cal. Penal Code § 25.5, compulsive gambling, Conn. Gen. Stat. Ann. § 53a-13(c), and alcoholism, Mont. Code Ann. § 46-14-101(2)(b)(iii). In all, slightly more than half the states completely remove certain kinds of mental abnormalities from consideration as excusable mental illnesses, regardless of what effect these conditions actually had on a defendant's cognition or volition. While widely accepted by the states, this kind of restriction on what could qualify as a "disease of the mind" was not included in *M'Naghten*, and is inconsistent with Petitioner's position that only a few states have ever narrowed *M'Naghten*, and that such narrowing is presumptively unconstitutional.

The time when the states accepted the *M'Naghten* formulation of the insanity defense as an especially authoritative test is long past. Indeed, the fact that the states

have manifestly failed to approach a consensus about what exactly a substantive insanity defense should include is evidence not just of the inadequacy of the *M'Naghten* test, but the difficulty of formulating any substantive test adequate to accommodate the constantly changing views of mental illness and criminal responsibility in our society. Writing any particular substantive mental illness defense into state law through the Due Process Clause would negate this diversity and frustrate the search for better ways to define the line between mental illness and criminal responsibility.

C. A Substantial Majority of the States Have Rejected Knowledge of the Nature and Quality of an Act as an Independent Element of Their Insanity Tests.

Petitioner concedes that only 20 states expressly consider whether defendant understood the nature and quality of his act, or an equivalent concept, in ascertaining whether to accord him an insanity defense. They can be broken down as follows: In addition to the eight pure *M'Naghten* jurisdictions, the two remaining common law irresistible impulse jurisdictions also preserve the nature and quality element as a separate portion of their cognitive tests.[10] This language is much less common in states that have statutorily reformed their defenses, however. Only four states have retained "nature and quality of the act" as a distinct statutory element, and one of these has eliminated the "did not know what he was doing was wrong" portion of the test.[11] Six other statutory cognitive tests retain the idea, but in different form, either by dropping one of

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[10] *State v Hartley*, 565 P 2d 658, 660 (N M 1977), *Vann v Commonwealth*, 544 S E 2d 879, 883 (Va Ct App 2001).

[11] Ala Code § 13A-3-1(a), Alaska Stat § 12.47 010 (eliminating wrongfulness), Cal Penal Code § 25, Mich Comp. Laws Ann § 768 21a(1); N D Cent Code § 12 1-04 1-01

the terms, or by substituting more or less similar language.[12]

But by far the most common approach of statutory codifications is to abandon, as Arizona did, any reference to nature and quality of the act, in preference to a cognitive test that focuses on the ability to tell right from wrong. Most notably, the ALI test abandons any reference to understanding the nature of the conduct at issue, and focuses instead on the defendant's capacity to appreciate the wrongfulness (or criminality) of the act, an approach followed virtually without exception by the jurisdictions adopting the ALI test.[13] *See also* LaFave, *Substantive Criminal Law* § 7.2, n.7 (noting that "[s]everal states have now adopted the *M'Naghten* rule by legislation, typically without the 'nature and quality of the act' prong").

Despite the fact that the ALI test is as bereft of any mention of "nature" or "quality" as the Arizona test he condemns, Petitioner insists that the many jurisdictions employing the ALI formulation actually support his position that the nature and quality element is fundamental, because the ALI test is "broader than and subsumes the *M'Naghten* rule." Pet. Br. at 38. While Petitioner is quite right that the ALI test subsumes both prongs of the original *M'Naghten* formulation, it is for a reason that applies equally to Arizona's statute, or any other cognitive test focused on wrongfulness. Any test that requires knowledge (or capacity to appreciate) that one's acts are wrong, requires, as a logical predicate, knowledge of what

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[12]*See* Fla Stat Ann § 775 027(1) (defendant did not "know what he was doing or the consequences thereof"), Minn Stat Ann § 611 026 (nature only), Tenn Code Ann § 39-11-501(a) (nature only), N Y Penal Law § 40.15 (lacked substantial capacity to know or appreciate "nature and consequences" of such conduct), Mo Rev. Stat Ann § 562 086 (incapable of knowing and appreciating the nature, quality or wrongfulness of conduct).

[13]Michigan is the sole exception Mich Comp Laws Ann § 768 21a(1)

those acts are: "If the defendant does not know the nature and quality of his act, then quite obviously he does not know that his act is wrong." LaFave, *Substantive Criminal Law* § 7.2(b)(4). It is because of this fundamental redundancy that insanity tests that drop the express nature and quality test, like Arizona's, and like the ALI test, do not subtract anything significant from the *M'Naghten* formulation.

Petitioner has not suggested what kind of mental illness could, even in theory, leave a person with an intact ability to understand that his act was wrong, while destroying his ability to know what the nature of his act was. Instead, Petitioner sidesteps the question by changing the test. While Petitioner speculates that "unawareness of the nature of his acts could coexist in [his] psychotic mind with knowledge of the wrongness of killing," Pet. Br. at 47, that is beside the point. To be sane under the Arizona statute, a defendant must know "at the time of the criminal act" that "the criminal act" was wrong. Thus, the real question is whether unawareness of the nature of his acts could coexist in his mind with knowledge that *his acts* were wrong. If Petitioner suffered from such an idiosyncratic mental illness, he has pointed to nothing in the record that would show it.

If this Court invalidates Arizona's insanity defense statute because it does not explicitly mention the failure to recognize the nature and quality of one's acts as a separate basis for acquittal, it will call into serious question the constitutionality of the majority of state insanity defense laws, which are similarly silent on the issue. Petitioner offers no justification for such a radical departure from this Court's confirmed unwillingness to disturb state substantive criminal law under the authority of the Due Process Clause.

To be sure, none of the foregoing should be read to gainsay that *M'Naghten* was, and remains, a touchstone of American criminal law. The point is that what was important about *M'Naghten* was not the exact words the Lord Chief

Justice chose to express the idea, but rather the idea itself—that the relevance of insanity to criminal liability was the extent to which it prevented the defendant from knowing what he was doing was wrong. That excusing those (and only those) who did not know they were doing wrong is the aspect of *M'Naghten* that has influenced American law is demonstrated most clearly by the fact that *M'Naghten* is widely and authoritatively known as the "right-wrong test." Although Petitioner dismisses this usage as a mere colloquialism, Pet. Br. at p. 37 n.40, those who have thought "right-wrong test" an appropriate synonym for *M'Naghten* include many eminent commentators, generally in contexts where loose language would be unlikely. *See, e.g.*, Albert W. Alschuler, *The Changing Purposes of Criminal Punishment*, 70 U. Chi. L. Rev. 1, 13 & n.2 (2003); LaFave, *Substantive Criminal Law* § 7.1(a); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (Marshall, J., plurality opinion); *Durham v. United States*, 214 F.2d 862, 869 (D.C. Cir. 1954) (Bazelon, J.). In contrast, if any American authority has ever referred to *M'Naghten* as "the nature-quality test," even colloquially, Petitioner has not brought it to the Court's attention.

In addition to being widespread in American law, the idea that a test based on distinguishing right from wrong is the quintessential feature of *M'Naghten* is as old as American awareness of the case itself. *See Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501-02 (1844) (describing *M'Naghten* as standing for the rule of law that a "man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong"); *see also Parsons v. State*, 2 So. 854, 859 (Ala. 1887) (describing the "single test" of *M'Naghten* as "the capacity to distinguish right from wrong").

To the extent that *M'Naghten* continues to animate American insanity law, it is not through the respect states have for its form; as amici have shown, that form has been

abandoned, in whole or in part, by a large majority. Rather, the continuing influence of *M'Naghten* is shown by the fact that fully 44 states have insanity defenses that explicitly determine culpability (at least in part) with reference to the defendant's understanding that what he was doing was wrong. This, of course, is precisely what Ariz. Rev. Stat. § 13-502 provides. Arizona's substantive insanity defense reflects not only the broad American consensus about what *M'Naghten* stands for, but also embodies the one element of the diverse substantive insanity tests that can accurately be said to be common to a large majority of the states.

II. No Fundamental Principle of Justice Requires States to Provide a Diminished Capacity Defense.

The trial court, after considering all the evidence Petitioner presented regarding his mental condition, found as a factual matter that he was not insane within the meaning of Arizona law. That is, at the time of his criminal act he was not "afflicted with a mental disease or defect of such severity that the [he] did not know the criminal act was wrong." Ariz. Rev. Stat. § 13-502(A). While he does not challenge that determination here, Petitioner argues that the trial court erred in failing to consider whether the same evidence established that he was incapable of knowing that his act would cause the death of a police officer. But under Arizona law, and under the facts of this case, it is really the same question. If Petitioner had a mental disease that rendered him incapable of knowing that his act would cause the death of a police officer, then that condition would equally have made him unable to know that the same act was wrong. Requiring affirmative proof that Petitioner was capable of entertaining the basic mental states by which the culpability of criminal conduct is judged in Arizona effectively requires the prosecution to prove that Petitioner was sane. While many states have taken this approach, either by requiring

the prosecution to disprove insanity generally, or by requiring the prosecution to establish that the defendant was capable notwithstanding any mental illness, of entertaining the specific intent required for a crime, the Due Process Clause requires no such result. To the contrary, the common law tradition is that proof of sanity is not an element of the prosecution's case on *mens rea*, but is a defense that must be affirmatively raised and proved by the defendant. To hold that due process compels such a diminished capacity defense would seriously undermine the states' ability to define their own substantive criminal law, and would threaten to replace it with a federal constitutional law of insanity of uncertain scope and content.

A. The *Mott* Rule is a Substantive Rejection of the Diminished Capacity Defense, and Excludes Evidence Because it is Irrelevant Under the State's Substantive Law.

In an attempt to analogize his case to such cases as *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Chambers v. Mississippi*, 410 U.S. 284 (1973), Petitioner suggests that the trial court's refusal to consider mental illness evidence offered to establish that he was incapable of forming the requisite *mens rea* amounted to a "blanket exclusion" of exculpatory evidence. But it is a strange kind of blanket exclusion which, at least in this case, actually excluded no evidence. Petitioner's true complaint is that the *Mott* rule prohibited the trial court from considering evidence of mental disease for certain purposes—specifically, deciding whether Petitioner possessed the requisite *mens rea*. That *Mott* has this effect shows that it is more than just an evidentiary rule, like those at issue in *Rock* and *Chambers*. Rather, as *Mott* makes clear, it is a recognition that the Arizona legislature has substantively defined *mens rea* in such a way as to make mental disease evidence irrelevant.

Mott is quite explicit in explaining that its result rests on the fact that the Arizona legislature did not establish a diminished capacity defense (and indeed implicitly rejected such a defense), and that "the legislature is responsible for promulgating the criminal law." *State v. Mott*, 931 P.2d 1046, 1050-51 (Ariz. 1997). Thus, "[b]ecause the legislature has not provided for a diminished capacity defense, we have since consistently refused to allow psychiatric testimony to negate specific intent." *Id.* at 1051. Any evidentiary exclusion *Mott* effects is because the evidence relates to a substantive defense that does not exist. It is simply an application of the uncontroversial rule that irrelevant evidence should be excluded.

Nor, contrary to Petitioner's suggestion, does this reading ascribe to the Arizona legislature an irrational desire to treat those incapable of forming *mens rea* identically to those with no mental illness. Rather, it suggests the quite reasonable decision to use a single standard to judge the behavior of all defendants who purport to suffer from such a severe mental disease that they are incapable of forming the mental states that are used to gauge the criminal culpability of those without a mental illness. This single standard is embodied in Arizona's affirmative insanity defense, and is the method by which evidence of mental illness can be used to negate *mens rea*.

B. A Constitutional Diminished Capacity Defense is Contrary to the Common Law Tradition That Proving Sanity is an Not an Element of the Prosecution's Case.

It is hardly surprising that Arizona's lawmakers have chosen a single, unified mental illness defense, rather than requiring proof that the defendant lacks a mental illness preventing formation of a particular culpable mental state as an element of each crime. Arizona's method of assessing the

impact of mental disease on culpability is supported by several hundred years of common law tradition. At common law, the rule was clear. The prosecution was not affirmatively required to prove that the defendant had the capability to form intent. Instead, sanity was presumed, and the burden was on the defendant to show that his cognition departed so far from normal that he should be excused from criminal liability. *M'Naghten* makes this point explicitly: "the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction."[14] 8 Eng. Rep. 718, 722 (1843).

Although he is elsewhere quite insistent that *M'Naghten* be strictly observed, on this lone point Petitioner criticizes the case as the culmination of a "preoccup[ation] with developing . . . arbitrary tests of irresponsibility" which distracted courts from a more ancient tradition of using mental health evidence to cast doubt on the *mens rea* elements of certain offenses. Pet. Br. at 29-30 & n.37. In reality, diminished capacity is a modern development, and is in fact yet another attempt by courts to accommodate perceived limitations in *M'Naghten*'s insanity test to evolving psychological science. *See, e.g., State v. Wilcox*, 436 N.E.2d 523, 524-30 (Ohio 1982) (tracing development of diminished capacity doctrine from its origins in an 1867 Scottish case, and noting that "[t]he diminished capacity defense does serve to ameliorate the limitations of the traditional, *M'Naghten*, right from wrong test for insanity.").

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[14]Blackstone also makes clear that the common law saw insanity as a special excuse, rather than as a part of the definition of a crime. After considering the crimes and punishments available at common law, the Commentaries separately consider the "several pleas or excuses," including insanity, which are "particular and special exceptions" to the "general rule that no person shall be excused from punishment for desobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves." 4 William Blackstone, Commentaries * 21

Moreover, the reticulated mental states that diminished capacity envisions have much more to do with modern psychology than with any traditional notions of legal responsibility:

> The law recognizes no degree of sanity. Applying socially and morally acceptable standards a line has been drawn—on one side are the legally sane, on the other side are the legally insane. "[T]o the psychiatrist mental cases are a series of imperceptible gradations . . . , whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane."

State v. Bouwman, 328 N.W.2d 703, 706 (Minn. 1982) (quoting *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945)). While states may reasonably depart from the common law tradition by making the fact that a defendant had a sufficient level of rationality to form a particular mental state an element of every crime, the Due Process Clause does not prohibit states from following the common law tradition of making insanity a separate question from the particular *mens rea* necessary for the crime.

C. A Constitutional Diminished Capacity Defense Would Displace State Substantive Insanity Defenses With an Ill-Defined Constitutional Law of Insanity.

As with nearly every aspect of insanity law, many jurisdictions have freely departed from the common law tradition, either by putting the burden to disprove a global

affirmative defense of insanity on the prosecution, or by providing a diminished capacity defense requiring proof of the ability to form the specific mental state at issue. The experience of these jurisdictions demonstrates, however, that diminished capacity is a diffuse, fluid concept that would be extraordinarily problematic as a constitutional doctrine. While Petitioner's argument that *M'Naghten* is incorporated in the Due Process Clause deeply impinges on the states' prerogative to determine their own substantive criminal law, it would at least impose on the states a specific, concrete test with a long history of interpretation and analysis defining its parameters. In contrast, diminished capacity has no such structure and would either permit criminal defendants an unlimited right to present psychological evidence of dubious reliability and relevance, or alternatively, require this Court to develop limiting principles of constitutional insanity law. This unpalatable choice shows that the proper path is the one the Court has always followed—permitting states to decide the content of their own substantive criminal law.

1. Under Petitioner's proposed constitutional diminished capacity doctrine, states would be required to consider mental illness, short of insanity as defined by state law, whenever it might, factually, negate the capacity to form the *mens rea* associated with the charged offense. But this rule actually raises more questions than it answers. First, what is a mental illness, for constitutional purposes? Generally, states have refrained from offering specific definitions of what a mental disease or defect is, instead relying on the insanity tests themselves to narrow the class of conditions to which the defense was applicable, or have defined the concept by specifying what a mental illness is not. But Petitioner's proposed rule contains no such limiting principle, opening the door to one of the problems that has frequently accompanied the insanity defense: speculative and unreliable theories of mental disease. *See, e.g., Zamora v. State*, 361 So.2d 776, 779

(Fla. Ct. App. 1978) (rejecting defense founded on expert testimony of "acute subliminal television intoxication"); *Chase v. United States*, 468 F.2d 141, 148 (7th Cir. 1972) (rejecting claims that defendants were entitled to show with expert testimony that they lacked cognitive capacity to distinguish right from wrong because their moral judgment about war was at odds with that of society); *see also* LaFave, *Substantive Criminal Law* § 7.2(b)(1), nn. 52-53 (describing novel theories of mental illness, ranging from "homosexual panic" defense, to "urban survival syndrome," to "cultural paranoia").[15] Even where speculative theories of mental illness are rejected by juries, permitting their presentation has costs, since such theories frequently generate substantial adverse publicity that tends to call into question in the minds of the public whether the criminal justice system actually seeks justice. Moreover, requiring state criminal law to treat such conditions with the same gravity as it accords what states have determined to be serious mental illnesses tends to denigrate the import of the insanity defense in the minds of potential jurors and may even cause the public to question whether mental illness is actually a serious disease.

It is no solution to rely on scientific definitions of mental illness. As the Court of Appeals for the District of Columbia Circuit said in a landmark case:

> Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a 'mental disease or defect' for

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[15]Indeed, it was precisely this kind of problem that led to the repudiation of the diminished capacity defense in California, particularly after the outcry that followed the use of the so-called "twinkie defense." *See People v. White*, 117 Cal. App. 3d 270 (1981), *State v. Wilcox*, 436 N.E.2d 523, 531 (Ohio 1982)

> clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility.

McDonald v United States, 312 F.2d 847, 851 (D.C. Cir. 1962) (en banc). The alternative to *ad hoc* definitions of mental illness is for this Court to define a constitutional standard for what a mental disease is. But there is no constitutional source that suggests an answer to this question, or even how one might approach, to take one instance, the question of whether a particular cultural background might give rise to a mental illness defense. *See, e g*, Note, *The Cultural Defense in Criminal Law*, 99 Harv. L. Rev. 1293, 1293-95 (1986) (explaining how differing cultural values might give rise to an insanity or diminished capacity defense). Defining what a "mental illness" is for criminal law purposes is neither a trivial problem nor one that a constitutional diminished capacity defense could avoid, at least without imposing high costs on the perceived reliability, indeed even the seriousness, of the criminal justice system.

The second question Petitioner's argument raises is what, exactly, does it mean for a particular mental illness to negate *mens rea*? If Arizona is not permitted to decide, as it did here, that only conditions that satisfy its particular substantive insanity defense negate *mens rea*, then it will effectively lose the ability to define what insanity means in Arizona. A constitutional diminished capacity test would license criminal defendants to argue any one of the many varieties of mental-illness defense, even though the state may have rejected them by substantive law. For example, even if a state has rejected a volitional test of insanity, a defendant will nevertheless be able to argue that the existence of a mental condition affecting his self-control raises reasonable doubt about whether he acted intentionally or purposely with respect to the particular conduct

at issue. In short, a constitutional diminished capacity defense very quickly will become a version of the product test, with juries invited to determine in each case, with very little guidance, what the effect of a defendant's claimed mental illness should be on his culpability. *See* Peter Aranella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Colum. L. Rev. 827, 845 (1977) ("Since the diminished capacity defense requires the jury to make an individualized culpability judgment in each case, it does not lend itself to a consistent and principled application.").

Moreover, Petitioner's position would require that courts effectively rewrite every state's substantive law of *mens rea*. As a majority of this Court recognized in *Montana v. Egelhoff*, states have broad discretion to define the elements of crimes, and to define a crime's *mens rea* element in such a fashion as to make certain excuses factually and legally irrelevant. 518 U.S. 37, 41 n.4 (plurality opinion); *id.* at 58 (Ginsburg, J., concurring) (states may define *mens rea* to exclude entirely question of voluntary intoxication); *see also Martin v. Ohio*, 480 U.S. 228, 235 (1987) (Ohio free to define mental state element of aggravated murder so that it is not defeated by purportedly lawful or non-criminal intent such as that involved in self-defense); *Patterson v. New York*, 432 U.S. 197, 206 (1977) (New York free to define mental state element of murder so that proving lack of extreme emotional disturbance not element of state's case). Petitioner, by contrast, seeks to force on the states a uniform constitutional *mens rea* rule under which the effects of mental illness are always relevant. Such a rule is inconsistent with the states' acknowledged primacy in defining their own substantive criminal law.

2. A constitutional diminished capacity test would threaten to supercede the substantive insanity defenses now set forth in state law. Defendants may certainly prefer to argue

diminished capacity in most, if not all, cases, since it provides three important advantages over the affirmative insanity defenses. First, a diminished capacity defense results in a complete acquittal for the defendant, rather than automatic detention and commitment that acquittals based upon insanity generally produce. This would undermine the states' important interest in making sure that persons with mental illnesses that have rendered them dangerous to others are prevented from harming others and required to receive treatment. Second, the diminished capacity defense, because it is conceived of as an element of the state's case, requires the prosecution to disprove the effect of the mental illness on culpability beyond a reasonable doubt. In contrast, many states follow the common law tradition and place the burden of proof of insanity on the defendant. The third important reason defendants are likely to prefer constitutional diminished capacity to an affirmative insanity defense is the strategic flexibility that the definitional and doctrinal uncertainty discussed above provides. If the mental condition for which a defendant seeks a defense is not recognized as a mental disease under state law, or if the standard of impairment is difficult to meet, the defendant will be able to reformulate the defense as one going to the capacity to form *mens rea*.

Ultimately, adopting the diminished capacity defense as a principle of constitutional law would have implications for primacy of state substantive criminal law far beyond the specific context of insanity. Petitioner's argument rests, at bottom, on the idea that the Due Process Clause regulates the relationship between *mens rea* and criminal culpability. If this is really the case, then this Court will need to develop a constitutional doctrine of *mens rea* that explains not just what the minimal level "guilty mind" is required for conviction, but indeed, what factors are necessarily sufficient as a constitutional matter to negate *mens rea*. This implies that the Court will need to develop constitutional doctrines for other defenses that

have traditionally excused otherwise guilty conduct, including things like mistake, duress, self-defense and intoxication. In short, creating a constitutional diminished capacity defense is a first step down a long, uncertain path that ultimately leads to a comprehensive substantive criminal law of the Due Process Clause. This Court has consistently refrained from embarking on such a course, a determination this case presents no occasion to relax.

CONCLUSION

For these reasons, amici states urge that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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